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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 284

LOUIS R. MARKUN and MAPLE ROAD VILLAGE, INC.,

Petitioners,

v.

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

LOUIS R. MARKUN and MAPLE ROAD VILLAGE, INC.,

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v.

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Louis R. Markun and Maple Road Village, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on April 11, 1956.

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Citation to Opinion Below

The District Court did not render an opinion. The opinion of the Seventh Circuit Court of Appeals (R. 103-112), a copy of which is contained in the Appendix hereto, *infra*, pp. 9-19, is reported at 231 F.2d 833.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 11, 1956 (R. 114), and a copy is appended to this petition in the Appendix at p. 20. Petitioners' petition for rehearing was denied on May 1, 1956 (R. 133). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether under Rule 43(a) of the Federal Rules of Civil Procedure the taking of the pre-trial deposition of the petitioner Markun by respondents pursuant to Rule 26 waived his incompetency to testify at the trial under the Indiana Dead Man's Statute, 2 Burns' Ind. Stats. (1946 Repl.), sec. 2-1715, when under the Indiana rule in *Oleska* v. *Kotur*, 113 Ind. App. 428, 48 N.E.2d 88, the taking of his deposition would have such effect in the State courts.

Statute and Federal Rules Involved

The pertinent portion of the Indiana Dead Man's Statute, 2 Burns' Ind. Stats. (1946 Repl.), sec. 2-1715, provides:

> "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or

> administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate : * * * ."

The pertinent portion of Rule 26(f) of the Federal Rules of Civil Procedure provides:

> "(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. * * *"

Rule 43(a) of the Federal Rules of Civil Procedure provides:

> "(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is hereby made. The competency of a witness to testify shall be determined in like manner."

Statement of the Case

This is an action brought in the United States District Court for the Southern District of Indiana by respondents as personal representatives of the estate of Jack Marks, who died a citizen and resident of West Virginia, to recover from petitioners the unpaid balance allegedly owing

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the estate on two $25,000 checks that the decedent gave to his nephew, the petitioner Louis R. Markun. Respondents are citizens of West Virginia and petitioners citizens of Indiana.

The complaint alleged that the two checks were given by Jack Marks to the petitioner Markun as a loan in 1950, and after crediting certain monthly payments made by the petitioner Maple Road Village, Inc. prior to the death of Jack Marks on July 27, 1952, there was a balance owing the decedent's estate of $44,404.91 and interest (R. 2-7). Markun in his answer contended that the money had been given to him by his uncle as an advance on Markun's share in his uncle's estate under an oral agreement to make such monthly payments only if financially able to do so and without further obligation upon the death of either of them (R. 28-29). The answers of both petitioners alleged that the $50,000 was loaned by Markun to Maple Road Village, Inc., a corporation owned by Markun and his family (R. 62), with instructions to make such monthly payments to Jack Marks (R. 29, 31).

Respondents took Markun's pre-trial deposition who testified concerning the circumstances under which the $50,000 was given to him by his deceased uncle, the terms of the oral agreement, and conversations and transactions relating thereto with the decedent (R. 61-73).

Petitioners then filed motions for summary judgment on the ground that there were no genuine issues of fact, referring to Markun's deposition on file and his affidavit filed with such motions to which were attached certain exhibits including a copy of the will of Jack Marks dated January 22, 1952, probated in Harrison County, West Virginia (R. 32-41, 46-55). Paragraph Sixth of the will contains a provision concerning the testator's $50,000

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transaction with Markun (R. 50-51). Respondents filed counter-affidavits to the effect that the monthly payments made were interest payments and reported as such on Jack Marks' books and his Federal income tax returns (R. 42-44, 45, 56).

The District Court sustained petitioners' motions for summary judgment (R. 58), and on May 26, 1955, entered judgment that the action be dismissed on the merits (R. 58).

On appeal, the court below reversed the judgment of the District Court (R. 114), and in remanding the case held that issues of fact were presented which required a trial on the merits (R. 108). The court below further held that respondents, by taking Markun's deposition, had not waived their right to object at the trial that Markun was incompetent to testify under the Indiana Dead Man's Statute as to conversations and transactions with the decedent, Jack Marks, concerning the transfer of the two $25,000 checks to Markun (R. 111-112).

Reasons for Granting the Writ

The decision of the court below holding that Markun's incompetency to testify at the trial under the Indiana Dead Man's Statute has not been waived, although the taking of his deposition by respondents waived his incompetency under Indiana law, fails to give proper effect to Rule 43(a) of the Federal Rules of Civil Procedure. The decision below conflicts with the decision of this Court in *Huddleston* v. *Dwyer*, 322 U.S. 232, holding that where a Federal Rule makes state law applicable, the procedural rights of the parties are to be determined in the same manner as substantive state law is determined under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

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Rule 43(a) in substance provides that the statute or rule, federal or state, "which favors the reception of the evidence governs. * * * The competency of a witness to testify shall be determined in like manner."[1] The Indiana rule in *Oleska* v. *Kotur*, 113 Ind. App. 428, 48 N.E.2d 88, which would permit Markun to testify at the trial if his deposition had been taken in an action brought in the Indiana courts,[2] thus must be applied by a Federal court sitting within Indiana as the state rule favors the reception of the evidence.

The fact twice mentioned in the opinion below that the respondents did not offer the deposition in evidence (R. 110, 111) is of no consequence in view of the ruling in the *Oleska* case by the Indiana Appellate Court. The court there stated (113 Ind. App. at 446, 48 N.E.2d at 95):

> "The appellant, however, insists that he did not call the appellee as a witness at the trial but merely examined her under oath prior thereto; that such examination was not introduced in evidence by him and therefore her statutory incompetency was not waived. The value of the conditional examination[3] of parties is well known and recognized by the legal profession. In the instant case death has denied it to the appellee while it was available to the appellants with all its attendant advantages. It seems to us that the construction of the statute under consideration for which the appellant contends would augment its pur-

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[1] 5 Moore's *Federal Practice* (2d Ed.), sec. 43.02(4), p. 1314 states, "While the rule is cast in favor of admissibility and competency, in general its net effect has been to refer the question to state law for solution, including decisional law."

[2] The Indiana rule on waiver is supported by the decided weight of authority in other states construing similar statutes. The cases are collected in an Annotation in 64 A.L.R. 1148, 1164, supplemented in 107 A.L.R. 482, 490, and 159 A.L.R. 411, 421.

[3] In Indiana a pre-trial deposition of an adverse party is called a "conditional examination." See 2 Burns' Ind. Stats. (1955 Supp.), sec. 2-1728.

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pose by permitting the dead to take advantage of the living and thereby take one edge off the sword."

Rule 26(f), relied upon in the opinion below, providing that "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. * * *", imposes no restriction or qualification on Rule 43(a). Admittedly respondents by taking Markun's deposition under Rule 26 have not made him their witness, but under the state law made expressly applicable by Rule 43(a) respondents have opened the door for Markun to testify at the trial on his own behalf.

The decision below is in conflict with the decision in *Mutual Life Ins. Co.* v. *Green* (W.D.Ky.), 37 F.Supp. 949, 951, where in applying Kentucky law waiving the incompetency of the deponent the court referred to the former Competency of Witness Act, 28 U.S.C. 631 (1940 ed.),[4] and stated that Rule 43(a) "liberalized the reception of evidence rather than restricting it." See also, *Dellefield* v. *Blockdel Realty Co.* (C.A.2), 128 F.2d 85, 92-93.

Anderson v. *Benson* (D.C. Nebr.), 117 F.Supp. 765, cited in the opinion below, is implicit authority that the state law on waiver governs. The Nebraska Dead Man's Statute barred the adverse party from testifying unless the personal representative "shall have introduced a witness who shall have testified * * *". In the absence of any Nebraska decision construing the statute, the court held that the taking and filing of a deposition pursuant to Rule 26 is not "introducing a witness" within the meaning of the Nebraska statute. The Indiana statute contains no such limitation, and the construction given thereto by the

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[4] Repealed by the Judicial Code Revision Act of 1948, 62 Stat. 869, for the stated reason that its subject matter was "Governed by Rule 43(a) of the Federal Rules of Civil Procedure." H. Rep. No. 308 (80th Cong., 1st Sess. 1947), p. A238.

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Indiana Appellate Court in the *Oleska* case must be read into the statute as a part of Indiana law to be applied under Rule 43(a).

The decision below is most anomalous in that it requires the District Court upon remand to apply the state law making Markun incompetent, but not the state law on waiver removing his incompetency by the taking of his deposition. Since the state law is to be applied under Rule 43(a), then it must be applied in all its aspects including a waiver which permits the reception of the evidence. And there is nothing in Rule 26(f) which supports a contrary conclusion because a Federal discovery deposition was taken.

The decision below presents an important question under the Federal Rules of Civil Procedure which should be settled by this Court.

Conclusion

Although the judgment of the court below remanding the case for trial is not a final one, yet its ruling that the incompetency of the petitioner Markun to testify at the trial has not been waived involves an issue of crucial importance in the further conduct of the case which makes the case appropriate for review by this Court. See, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 731, 734.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

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APPENDIX

(Opinion Below)

In the

United States Court of Appeals

For the Seventh Circuit

No. 11512. October Term, 1955—April Session, 1956.

Joseph J. Duling and Charles C. Scott, Executors of the Last Will and Testament of Jack Marks, Deceased,
Plaintiffs-Appellants,
v.
Louis R. Markun and Maple Road Village, Inc.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

April 11, 1956.

Before Duffy, *Chief Judge*, and Lindley and Swaim, *Circuit Judges*.

Duffy, *Chief Judge*. Plaintiffs brought this action as the executors of the will of Jack Marks, deceased, alleging

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defendants were indebted to the Marks Estate in the sum of $44,404.91 and interest. The claim was based upon two checks of $25,000 each, executed by Marks and delivered by him to defendant Markun in August, 1950 and November, 1950, respectively.

The complaint herein was filed on March 11, 1954, and, together with the summons, was served on defendants on March 16, 1954. A notice of appearance by defendants was filed on March 30, 1954. Thereafter occurred a pattern of flagrant disregard of Federal Rules of Civil Procedure insofar as the dates for filing pleadings are concerned. Although answer or other responsive pleading by defendants should have been filed by April 5, 1954, defendants did nothing until after June 7, 1954, on which date plaintiffs requested the clerk of the District Court to enter a default pursuant to Rule 55(a) Federal Rules of Civil Procedure. Just why the clerk did not enter a default does not appear from the record. Nine days thereafter on June 16, 1954, defendants moved for an extension of time to June 28, 1954 in order to answer the complaint. The application made no showing of "excusable neglect", but the motion was granted ex parte the following day. Thereafter, plaintiffs moved to vacate the order entered on June 17, 1954, but the motion was denied. On June 25, 1954 plaintiffs moved for a default judgment to be entered by the Court pursuant to Rule 55(b)(2) on the ground defendants had failed to answer or otherwise defend within the time prescribed by Rule 12(a), Federal Rules of Civil Procedure. This motion was denied.

On June 11, 1954 notice was served on the attorney who had appeared for defendants, that the deposition of defendant Markun would be taken on June 23, 1954. A subpoena was served on Markun to appear at a designated time and place. The day before the deposition was to be taken the attorney for defendant requested, by telephone, that the deposition be postponed, representing that defendant Markun was suffering from a bad case of poison ivy. The request for a postponement was refused because

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the principal counsel for plaintiffs was, at that time, enroute from Clarksburg, West Virginia to Indianapolis. Neither defendant nor his attorney appeared pursuant to the notice and subpoena, and when inquiry was made at the office of defendant's attorney, the latter's secretary read what purported to be a doctor's certificate to the effect that defendant Markun was confined to bed because of heat exhaustion. On June 25, 1954, because of defendant's failure to appear for examination, plaintiffs moved for default pursuant to Rule 37(d), Federal Rules of Civil Procedure. This motion was denied.

On June 28, 1954, the last day for filing answers under the Court's order of June 16, 1954, each defendant filed a motion to dismiss the complaint on the ground the allegations thereof were not sufficient to state a claim. On January 18, 1955 defendants were granted leave to withdraw their motions to dismiss and on that date, nine and one-half months after the answers were originally due, each defendant filed an answer. On February 2, 1955 each defendant filed a motion for summary judgment which motions were granted on May 20, 1955.

Jack Marks was a resident of Clarksburg, West Virginia. Defendant Louis Markun was his nephew, and resided in Indianapolis, Indiana. On August 28, 1950 Marks executed a check for $25,000, and on November 13, 1950, another check for $25,000, each payable to the order of defendant Louis Markun, each was drawn on funds personally owned by Marks, and each check was delivered to Markun. The checks were promptly deposited by Markun in an Indianapolis bank, and were paid in due course. Markun personally endorsed the checks, and beneath his signature on each check appeared "For deposit only. Maple Road Village, Inc." The defendant Markun is the president and a director of Maple Road Village, Inc., and he, his wife and son own all of the stock of the corporation.

Jack Marks died on July 27, 1952. However, before his death there had been repaid to him by defendant Markun the sum of $10,500, consisting of two payments of $250

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each, received respectively on September 29, 1950 and November 1, 1950, and twenty monthly payments of $500 each, beginning in December, 1950, and ending July, 1952. All of such payments were made by checks drawn on the account of the defendant Maple Road Village, Inc., twenty of the checks being signed by defendant Markun, and two by Markun's wife. Twenty of the checks contained on their face the notation that they were in payment of "interest."

In opposition to the motion for summary judgment, plaintiffs filed the affidavit of Marguerite Wyckoff who was the bookkeeper for Jack Marks. She disclosed that at Marks' direction she recorded in his journal or ledger the twenty-two checks received from defendant Markun as payments of interest, and that she furnished such monthly payment figures to the accountant who prepared Jack Marks' income tax returns. Miss Wyckoff also swore that in 1952, when Jack Marks was very ill and about one month before his death, defendant Markun telephoned asking that she advise Jack Marks that if he (Marks) should have need for the money, he (Markun) would arrange to repay to Marks the $50,000, or any part thereof that Marks might require. Proof was also made that in Marks' income tax returns the monthly payments from Markun were listed as "income from interest."

On this appeal plaintiffs urge as error 1) the District Court's denials of the several motions by defendants for default judgment were an abuse of discretion, and 2) the Court was in error in granting defendants' motions for summary judgment, as there were genuine issues of material facts which must be resolved.

The apparently callous disregard by defendants for the provisions of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, would have justified the entry of a default judgment for plaintiffs. However, the Court elected to disregard the defaults. There may have been some reasons known

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to the Court which do not appear in the record. The defaults may have been due to the frequent change in attorneys representing the defendants, for defendants have had at least four sets of attorneys in this proceeding. It should be mentioned, however, the attorneys for defendants on this appeal were not, in any way, involved in the defaults.

Whether a default should be entered or a default judgment be set aside, is a matter resting in the sound discretion of the trial judge. *Jones* v. *Jones*, 7 Cir., 217 F. (2d) 239; *Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir., 189 F. (2d) 242. Under the circumstances of this case, we cannot say that the District Court abused its discretion in failing to enter a default judgment.

If the pleadings, depositions and affidavits on file show there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law, then the trial court was correct in entering a summary judgment for defendants. Plaintiffs insist that there were and are genuine issues as to material facts, and in any event defendants were not entitled to judgment as a matter of law.

The primary issue in this case is as to the nature of the transaction whereby Marks handed over to defendant Markun the two $25,000 checks. In arguing it was a loan, plaintiffs point out that Marks, in making entries in his books, treated the monthly payments as interest, and also that Marks paid income tax on such payments on the basis that they were payments of interest. Plaintiffs also emphasize the willingness of Markun, when Marks was ill, to pay back the entire $50,000 if Marks desired that he should do so. They also point to the fact that Markun and his wife, on February 27, 1951, executed a mortgage to Marks in the sum of $50,000. Although the recital in the mortgage that the loan was evidenced by two $25,000 notes is erroneous, the dates of the alleged notes conform almost exactly to the dates when defendant Markun re-

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ceived the two $25,000 checks from Jack Marks. This mortgage was released by Marks on February 18, 1952, but this release did not purport to discharge the debt, if one existed. It might be here noted that defendant Markun's explanation of the debt recitals in the mortgage is that he was in financial difficulties on February 27, 1951, and in order to protect certain realty (we assume from his creditors), he and his wife executed and recorded the mortgage purporting to secure two $25,000 notes. Markun insists, however, there never were any notes and, in fact, that he was not indebted to Marks.

Defendant Markun claims that there was a close relationship between him and his uncle Jack Marks. Markun says he received the $50,000 from his uncle under an oral agreement that he would send his uncle, then seventy-nine years old, the sum of $500 a month if he, Markun, were financially able to do so, but the total of such payments was not to exceed $50,000; that the total amount actually repaid would be subtracted from the $50,000, and such amount would be treated in Marks' will as an advance against Markun's share of Marks' estate. Markun claims the agreement further provided that if either Marks or he died, there would be no further obligation on the part of him (Markun) or his estate with reference to the $50,000. Markun insists that the transaction was, in fact, a gift of $50,000 to him. Markun claims that one of the motives for the gift was that Marks had sold his poster advertising business in West Virginia for a sum in excess of $50,000, and he did not desire that sum of money to remain in West Virginia.

At the time when Markun filed his answer, he knew of the provisions of the Marks' will. In that pleading he made no reference to the will. However, in his motion for summary judgment, Markun relied on paragraph Sixth, which reads as follows:

> "SIXTH: After the payment of the specific bequests hereinbefore named, and the payment of the Federal

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> Inheritance Tax, State Transfer Tax and all other taxes and costs of administration, I give and bequeath unto my nephew, Lewis R. Markun, one-third (1/3) of said residue, from which my Executors shall deduct the sum of Fifty Thousand Dollars ($50,000.00), evidenced by two checks in the amount of Twenty-five Thousand Dollars ($25,000.00) each, due my estate from my nephew, Lewis R. Markun, together with any additional advancements made to him and evidenced by checks, which said sums so advanced are to be considered as a part of my estate."

Plaintiffs likewise rely on said paragraph Sixth of the will and point to the words used by Marks in that paragraph " * * * evidenced by two checks in the amount of Twenty-five Thousand Dollars ($25,000.00) each, *due my estate from my nephew, Lewis R. Markun* * * *."

Whether the $50,000 transaction was a loan or a gift may be a mixed question of law and fact. However, the intention of the parties, and the interpretation of the alleged agreement given to it by the parties, are questions of fact which, on this record, are sharply in dispute. These issues should be determined in a trial on the merits where full opportunity for cross-examination is afforded.

Defendant Markun urges that conceding arguendo the $50,000 transaction originally was a debt, the provisions of paragraph Sixth of the Marks' will changed it to an advancement. We do not know the basis of the trial court's decision as no written opinion was filed, nor was an oral opinion given. Hence, we are not informed whether the trial court gave any consideration to this contention. However, in our opinion, paragraph Sixth of the Marks' will, by itself, is not sufficient to show a change from a creditor-testator relationship to an advancement.

In this connection, we have before us defendants' motion to strike from our files an authenticated copy of a decree of the Circuit Court of Harrison County, West Virginia, con-

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struing the Sixth paragraph of the will of Jack Marks, deceased. The motion points out that this decree was not filed until after the entry of the judgment on March 26, 1955.

The will construction suit was instituted by the executors in the West Virginia court on March 30, 1954, and the motion for a construction of paragraph Sixth was made in May, 1954, shortly after the executors were advised that Markun was relying on paragraph Sixth of the will to sustain his contention. The executors had not been previously advised because, in his answer to this suit, Markun had not relied on any provision in Jack Marks' will. Because of congestion in the West Virginia court calendar, a hearing was not held until June 16, 1955. The decree was issued August 6, 1955. The transcript of the record on appeal to this Court had already been filed. We think it was proper to advise this Court of the decree and the motion to strike will be denied.

Service upon Markun in the West Virginia suit was obtained by publication pursuant to West Virginia statutes. There is no claim made here that the Court did not have jurisdiction to construe the will of Jack Marks. That Court decided the $50,000 transaction with Markun created a debt, and that the words "advancements" and "sums so advanced" were not employed in a technical sense as in the law of intestacy, but in the popular sense with a meaning equivalent to "loans."

Defendant Markun argues that he is not bound by the decree as he was not personally served. He also insists that the District Court, in applying State law, is not required to recognize unreported opinions of State nisi prius courts, citing *King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153.

We agree that the West Virginia decree does not personally bind Louis R. Markun, but the opinion of that Court is entitled to great respect. A West Virginia will is

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involved, and a West Virginia court applied West Virginia law. Furthermore, the opinion in King stated (333 U. S. 162) "* * * Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. * * *."

Inasmuch as there will be a trial on the merits we need consider only one further question. Defendant Markun's version of the $50,000 transaction is practically uncorroborated. Clearly he would be incompetent to testify as to the $50,000 transaction with Marks under the Indiana Dead Man's Statute. 2 Burns' Ind. Stats. (1946 Repl. § 2-1715).

Defendant Markun insists that this objection to his competency to testify has been waived because plaintiffs took his deposition pursuant to the discovery provisions of the Federal Rules of Civil Procedure.

The first attempt to take Markun's deposition failed because of the claim that Markun was suffering from poison ivy or perhaps heat exhaustion. When the deposition was finally taken on June 29, 1954, plaintiffs had on file three motions for default. The complaint was cast in the form of three alternative causes of action. It seemed proper for plaintiffs to ascertain what participation defendant Maple Road Village, Inc. had in the $50,000 transaction. Four letters of inquiry from the executors to Markun had been ignored. The twenty-two "interest" checks, although signed by Markun or his wife, were drawn on the account of the Maple Road Village, Inc. The discovery deposition thus taken was not offered in evidence by the plaintiffs. There was no waiver of the Dead Man's Statute unless the taking of the deposition was, in itself, a waiver.

Ignoring for the moment the question of waiver, Rule 43(a) Federal Rules of Civil Procedure[1] rules out the tes-

[1] "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence

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timony of Markun as to the transaction with the deceased Marks, whereby he received two checks for $25,000 each. Paraphrased, the Rule would read: "The competency of a witness to testify shall be determined under the statutes of the United States or under the rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity,[2] or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

The Federal statute "Competency of Witness Act"[3] was repealed by the 1948 Revision of the Code. It is, therefore, clear that the Indiana Dead Man's statute would be applicable, and by reason thereof Markun would be incompetent to testify.[4]

However, we are confronted with the question of waiver.

It is true that the taking of a deposition under Indiana law of a party who is otherwise incompetent would be a waiver. *Oleska, Administrator* v. *Kotur*, 113 Ind. App. 428, 48 N. E. (2d) 88. But the deposition in the case at bar was taken pursuant to the Federal Rules of Civil Procedure as a matter of discovery. The actions of the defendant Markun made such an examination almost imperative. In addition, plaintiffs, at that time, assumed that they would be granted

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applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *. The competency of a witness to testify shall be determined in like manner."

[2] "But where are these rules to be found? How vain will be the search for them has been shown, ante § 6. This part of Rule 43 seems to have little prospect of service." 1 Wigmore on Evidence, 3rd Ed. 201.

[3] "Competency of witness governed by state laws. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." 28 U. S. C. § 631.

[4] "However, if state law excludes the evidence and no federal statute or rule admits it, then the evidence must be rejected. 5 Moore's Federal Practice (2d Ed.), p. 1320, § 43.04." *Atlantic Coast Line R. Co.* v. *Dixon* (5th Cir.), 207 F. 2d 899, 903.

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a judgment by default. Before a judgment could be entered it was necessary to determine which of the three alternative causes of action could be sustained.

The question comes down to this. Under Federal Rules of Civil Procedure, plaintiffs were entitled to conduct a discovery examination and take the deposition of defendant Markun. A proceeding by discovery was particularly appropriate in view of Markun's unwillingness to disclose to the executors the nature of the transaction involving the two $25,000 checks. Plaintiffs did not offer the deposition in evidence. There was no intentional relinquishment on their part of their right to raise the objection as to the competency of Markun to testify. We do not think that a litigant in Federal Court must either refrain from taking advantage of the Federal Rules pertaining to discovery or to proceed to do so at his peril because, under state law, in a state court proceeding, the taking of a deposition is considered a waiver.

The Federal Rules themselves indicate that a waiver should not result from the mere taking of a discovery examination. Rule 26(f) provides, in substance, that a party shall not be deemed to make a person his own witness for any purpose by taking his deposition. "* * * The purpose of the first sentence of Rule 26(f) is to make it perfectly clear that by merely *taking* a deposition before trial a party does not impose restrictions upon himself with respect to the deponent at the actual trial." *Anderson* v. *Benson*, 117 F. Supp. 765, 771.

We hold plaintiffs did not waive their right to object at the trial that defendant Markun was incompetent to testify as to conversations and transactions with Jack Marks, now deceased, concerning the transfer of the two $25,000 checks to him.

Reversed and Remanded.

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APPENDIX—Continued

(Judgment Below)

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

WEDNESDAY, APRIL 11, 1956

Before

Hon. F. RYAN DUFFY, CHIEF JUDGE
Hon. WALTER C. LINDLEY, CIRCUIT JUDGE
Hon. H. NATHAN SWAIM, CIRCUIT JUDGE

JOSEPH J. DULING and CHARLES C. SCOTT,
Executors of the Last Will and
Testament of Jack Marks,

Plaintiffs-Appellants,

vs.

LOUIS R. MARKUN and MAPLE ROAD
VILLAGE, INC.,

Defendants-Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 284

LOUIS R. MARKUN and MAPLE ROAD VILLAGE, INC.,
Petitioners,

v.

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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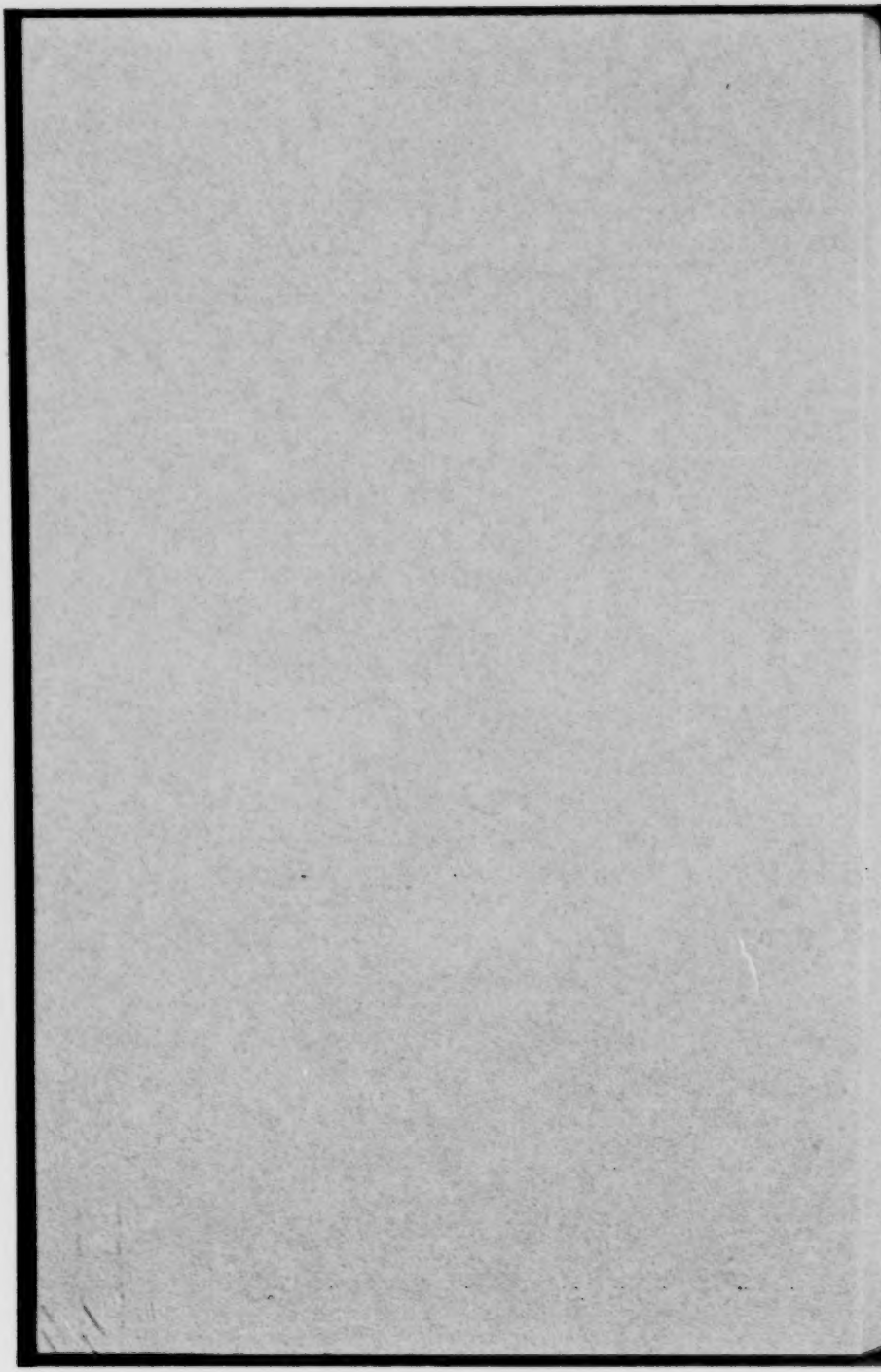

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IN THE

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No. 284

LOUIS R. MARKUN and MAPLE ROAD VILLAGE, INC.,
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JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals for the Seventh Circuit is reported at 231 F. 2d 833.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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QUESTION PRESENTED

Whether under the Federal Rules of Civil Procedure, Rule 43(a), the taking of the pre-trial deposition of the petitioner Markun pursuant to Rule 26(a) for the purpose of discovery at a time when the petitioners were already in default, when motions for a default judgment were pending against them, and when no denial of liability or showing of a good defense had been asserted by petitioners either through answers to repeated letters of inquiry sent to them by respondents or to the allegations of the complaint, waived petitioner Markun's incompetency to testify at the trial under the Indiana Dead Man's Statute?

STATUTES AND FEDERAL RULES INVOLVED

In addition to the portion of Burns' Ind. Stats. Ann. (1946 Repl.), sec. 2-1715, set out at pages 2-3 of the Petition, the following portion of section 2-1718, also part of the Indiana Dead Man's Statute, is involved:

> "* * * [I]n all cases referred to in sections two hundred and seventy-six (§ 2-1715), * * * any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the court may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion shall be reviewable on appeal."

In addition to the portions of Federal Rules of Civil Procedure, 26(f) and 43(a), set out at page 3 of the Petition, the following portion of Rule 26(a) is also involved:

> "(a) Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. * * * "

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STATEMENT OF THE CASE

This action was brought by respondents, as executors of the last will and testament of Jack Marks, deceased, to recover the balance of $44,404.91, plus accrued interest, due to the testator's estate upon a loan transaction under which the petitioner Louis R. Markun received the sum of $50,000.00 from the testator by two $25,000.00 checks issued during the latter's lifetime. Respondents are citizens of West Virginia and petitioners are citizens of Indiana. The complaint states three alternative causes of action, and demands judgment against the petitioners in the following alternative order: (1) against the petitioner Markun individually; (2) against the petitioners Markun and Maple Road Village, Inc., jointly and severally; or (3) against the petitioner Maple Road Village, Inc., individually (R. 2-7).

On August 28, 1950, Jack Marks executed a check for $25,000.00, and on November 13, 1950, another check for $25,000.00, each payable to the order of petitioner Louis R. Markun, each drawn on funds personally owned by Marks, and each check delivered to petitioner Markun. The checks were promptly deposited by Markun in an Indianapolis bank, and were paid in due course. Markun personally endorsed the checks, and beneath his signature on each check appeared: "For deposit only, Maple Road Village, Inc." (R. 3). The petitioner Markun is the president and a director of petitioner Maple Road Village, Inc., and he and his wife and son own all of the stock of the corporation (R. 28, 30, 62).

Jack Marks died on July 27, 1952. However, before his death there had been repaid to him by petitioner Markun the sum of $10,500.00, consisting of two pay-

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ments of $250.00 each, received respectively on September 29, 1950, and November 1, 1950, and twenty monthly payments of $500.00 each, beginning in December, 1950, and ending in July, 1952. All of such payments were made by checks drawn on the account of the petitioner Maple Road Village, Inc., twenty of the checks being signed by petitioner Markun, and two by Markun's wife. Twenty of the checks contained on their face the notation that they were in payment of "interest" (R. 3-4, 28, 42-44, 56). At Jack Marks' direction, his bookkeeper recorded in his journal or ledger the twenty-two checks received from petitioner Markun as payments of interest, and furnished such monthly figures to the accountant who prepared Jack Marks' income tax returns (R. 42-43). At Jack Marks' direction, his accountant reported on his income tax returns for the calendar years 1950, 1951 and 1952, as "income from interest" the amounts of the payments aggregating $10,500.00 received by Jack Marks during those calendar years (R. 45-46).

In 1952, when Jack Marks was very ill, about a month before his death, petitioner Markun telephoned Jack Marks' bookkeeper to ask that she advise Jack Marks that if he (Marks) should have need for the money, he (Markun) would arrange to repay Marks the $50,000.00, or any part thereof that Marks might require (R. 43). However, since Marks' death, no further payment of either principal or interest has been made by anyone upon the $50,000.00 transaction (R. 4, 28, 31).

On December 16, 1952, respondents, as executors of Jack Marks' will, wrote to petitioner Markun and asked him to advise if he were ready to pay over to them the balance of the $50,000.00, after crediting

thereon whatever sum he might be entitled to by reason of the repayment, totalling $10,500.00. They further stated that if for any reason Markun should contend that the balance of the $50,000.00 still outstanding and unpaid did not constitute a debt due and payable from him to the Jack Marks' estate, he should advise them just what his position was regarding the $50,000.00 transaction, and explain why the outstanding balance was not owing by him to the estate (R. 16-17). No reply to this letter was received by respondents, nor were any replies received to subsequent letters sent to petitioner Markun on March 3, 1953 (R. 18), October 27, 1953 (R. 18-19), and December 21, 1953 (R. 19-20).

In the last mentioned letter the respondents pointed out to petitioner Markun that he had never disputed that the unpaid portion of the $50,000.00 was a debt owing from him to the Jack Marks' estate, and they demanded that Markun immediately pay to the estate the balance of $44,404.91, together with interest accrued thereon at 6% from August 1, 1952, until paid. The letter further noted that if for any reason Markun contended that the petitioner Maple Road Village, Inc., was involved in this transaction and was obligated along with Markun on the debt, demand for payment was also made upon Maple Road Village, Inc.

The complaint herein was filed by respondents on March 11, 1954 (R. 2), and, together with the summons, was served on petitioners on March 16, 1954 (R. 9). A notice of appearance by petitioners was filed on March 30, 1954 (R. 9). Although answers or other responsive pleadings should have been filed by April 5, 1954, petitioners did nothing until after June 7, 1954, on which date respondents requested the clerk of the District Court to enter a default pursuant to

Rule 55(a) of the Federal Rules (R. 10). Nine days thereafter, on June 16, 1954, petitioners moved for an extension of time to June 28, 1954, in order to answer the complaint (R. 12-13). The application made no showing of "excusable neglect", but the motion was granted ex parte the following day (R. 13). Thereafter, on June 25, 1954, respondents moved to vacate the time extension order entered on June 17, 1954, and also for a default judgment to be entered by the Court pursuant to Federal Rule 55(b) (2) on the ground that petitioners had failed to answer or otherwise defend within the time prescribed by Rule 12(a) (R. 14-15).

On June 28, 1954, the last day for filing answers under the Court's order of June 17, 1954, each of the petitioners filed a motion to dismiss the complaint on the ground the allegations thereof were not sufficient to state a claim (R. 22-23). Since the Court's order extended the time solely so that petitioners could file "answers", on July 9, 1954, respondents again requested the clerk of the District Court to enter the default of the petitioners pursuant to Rule 55(a) (R. 24), and filed a second motion for a default judgment to be entered by the Court pursuant to Rule 55(b) (2) (R. 25).

After having requested the clerk to enter the petitioners' default pursuant to Rule 55(a), respondents on June 11, 1954, served notice on the attorney who had appeared for petitioners that the deposition of petitioner Markun would be taken on June 23, 1954 (R. 11-12). A subpoena was served on Markun to appear at a designated time and place. The afternoon before the deposition was to be taken the petitioner Markun's attorney requested, by telephone, that the

deposition be postponed representing that Markun had told him he had a bad case of poison ivy. The request for a postponement was refused because respondents' principal counsel was, at the time, enroute from Clarksburg, West Virginia, to Indianapolis. Neither petitioner Markun nor his attorney appeared pursuant to the notice and subpoena, and when inquiry was made at the office of petitioner's attorney, the latter's secretary read what purported to be a doctor's certificate to the effect that petitioner Markun was confined to bed because of heat exhaustion (R. 20-21). On June 25, 1954, because of petitioner Markun's failure to appear for examination respondents moved for a default judgment pursuant to Federal Rule 37(d) (R. 15).

While the three foregoing motions for default judgment against petitioners were pending, respondents on July 19, 1954, served the petitioner Markun with a notice that they would take his deposition on July 29, 1954 (R. 26). Markun appeared, and his deposition was taken (R. 61-73).

On January 18, 1955, the District Court denied respondents' motions for default judgment and granted petitioners leave to withdraw their motions to dismiss and to file answers (R. 27).

In petitioner Markun's answer it was averred that he received the $50,000.00 from his uncle, Jack Marks, under an oral agreement that he would send his uncle the sum of $500.00 a month if he, Markun, were financially able to do so, but the total of such payments was not to exceed $50,000.00. Pursuant to the alleged agreement, the amounts so sent to Jack Marks were to be credited against the $50,000.00, and such amount treated as an advance against Markun's share of

Marks' estate. Petitioner Markum's answer further alleged that, if either Marks or he died, the agreement was that there would be no further obligation on the part of Markum or his estate with reference to the $50,000.00 (R. 28-29). The answers of both petitioners alleged that the $50,000.00, after receipt from Jack Marks, was loaned by petitioner Markum to petitioner Maple Road Village, Inc., with instructions to make such monthly payments to Jack Marks (R. 29, 31).

On February 2, 1955, the petitioners filed motions for summary judgment supported by Markum's own affidavit and his deposition which had been taken by respondents (R. 32-34). Respondents filed affidavits in opposition (R. 42-46, 56), but the Court on May 20, 1955, granted petitioners' motions for summary judgment, and entered judgment dismissing the action on May 26, 1955 (R. 58).

On appeal to the United States Court of Appeals for the Seventh Circuit, that Court refused to reverse the judgment of the District Court for refusing to enter a default judgment (R. 106), although the Court of Appeals conceded that there had occurred a "pattern of flagrant disregard of Federal Rules of Civil Procedure insofar as the dates for filing pleadings are concerned" (R. 103), and that the "apparently callous disregard by [petitioners] for the provisions of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, would have justified the entry of a default judgment for [respondents]" (R. 106). However, the Court of Appeals held that the entry of a summary judgment was error (R. 108), and remanded the case for a trial on the merits in the District Court (R. 114). In so doing the Court of Appeals held that respondents,

by taking petitioner Markum's deposition for the purpose of discovery, "did not waive their right to object at the trial that [petitioner] Markum was incompetent to testify as to conversations and transactions with Jack Marks, now deceased, concerning the transfer of the two $25,000.00 checks to him." (R. 111-112).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Judgment Sought to be Reviewed Is Not Final

The judgment of the Court of Appeals reversing the District Court and remanding the case for a trial on the merits is not a final judgment. Moreover, the petitioners seek to have reviewed only a single facet of the judgment. In the present posture of the case, there is no meritorious reason for this Court to grant a writ of certiorari to review the single question presented by the Petition.

The portion of the judgment of the Court of Appeals which petitioners seek to have reviewed by this Court is the holding that respondents, by taking the petitioner Markum's deposition for the purpose of discovery, did not waive their right to object at the trial that petitioner Markum was incompetent to testify as to the $50,000.00 transaction with Jack Marks under the Indiana Dead Man's Statute. Burns' Ind. Stats. Ann. (1946 Repl.), sec. 2-1715. However, since the judgment below is not a final one, it is not appropriate for review by this Court unless it involves an issue "fundamental to the further conduct of the case." See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land* v. *Dollar*, 330 U.S. 731, 734 (1947). The issue pertaining to waiver of petitioner Markum's incompetency by the taking of his deposition is clearly not fundamental to the further conduct of the case

since other events might transpire at the trial which would serve to render Markun competent to testify.

Under Burns' Ind. Stats. Ann. (1946 Repl.), sec. 2-1718, respondents have the right to call petitioner Markun as a witness. Should the respondents avail themselves of this right at the trial, petitioner Markun will become a competent witness for all purposes. *Young* v. *Montgomery*, 161 Ind. 68, 67 N. E. 684 (1903); *Craig* v. *Norwood*, 61 Ind. App. 104, 108 N. E. 395 (1915). Likewise, section 2-1718 also provides, with reference to section 2-1715, that "the court may, in its discretion, require any party to a suit or other person to testify, and any such discretion shall be reviewable on appeal." In applying this statute, it is frequently held that where a party incompetent under the Dead Man's Statute has made a *prima facie* case or defense by independent evidence, it is not an abuse of discretion for the court to allow such party to testify. See, e.g., *Heavin* v. *Sutherlin*, 116 Ind. App. 310, 64 N. E. 2d 43 (1945). Accordingly, the ruling of the Court of Appeals that respondents did not waive petitioner Markun's incompetency by taking his deposition for the purpose of discovery is not "fundamental to the further conduct of the case", and the judgment does not merit review by this Court.

2. The Taking of the Discovery Deposition by Respondents Did Not Waive Petitioner Markun's Incompetency in View of the Unique Factual Situation Existing at the Time

When petitioner Markun's deposition was taken on July 29, 1954, the petitioners were already in default; they had never denied liability; they had never even stated that they had a good defense to the action; and respondents had three motions for default judgment pending. Respondents assumed that such a judgment

would be entered against the petitioners under one of the three alternative causes of action set out in the complaint; and the Court of Appeals in its opinion has remarked that the "apparently callous disregard by [petitioners] for the provisions of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, would have justified the entry of a default judgment for [respondents]" (R. 106). It would be a harsh rule indeed if, in such situation, the mere taking of a discovery deposition would waive the witness' incompetency.

In this connection, the Court of Appeals said in its opinion:

> "The question comes down to this. Under the Federal Rules of Civil Procedure, [respondents] were entitled to conduct a discovery examination and take the deposition of [petitioner] Markun. A proceeding by discovery was particularly appropriate in view of Markun's unwillingness to disclose to the executors the nature of the transaction involving the two $25,000 checks. [Respondents] did not offer the deposition in evidence. There was no intentional relinquishment on their part of their right to raise the objection as to the competency of Markun to testify. We do not think that a litigant in Federal Court must either refrain from taking advantage of the Federal Rules pertaining to discovery or to proceed to do so at his peril because, under state law, in a state court proceeding, the taking of a deposition is considered a waiver." (R. 111).

But it is not at all clear that under Indiana law the taking of a discovery deposition under such factual circumstances as were present here would waive petitioner Markun's incompetency. The case of *Oleska* v. *Kotur*, 113 Ind. App. 428, 48 N. E. 2d 88 (1943),

upon which petitioners rely, is clearly distinguishable from the case at bar. In the *Oleska* case it was the plaintiff who was incompetent to testify under the Indiana Dead Man's Statute, and the defendant administrator who took the deposition. By way of contrast, in the case at bar the plaintiff executors took the deposition of a defendant at a time when the defendants were in default. The two situations involve different considerations.

The case of *Schroeder* v. *Dickson Trust Co. of Richmond*, 110 Ind. App. 295, 38 N. E. 2d 868 (1942), is closer to the factual situation of the case at bar. There the plaintiff administrator brought an action against defendants for intermeddling, charging them with having possession of certain United States Treasury Bonds which constituted part of the decedent's estate. Prior to the commencement of the action, the administrator examined the defendants in the probate court as to their possession and ownership of the bonds in question under a provision of the Indiana Probate Code. The court held that such examination did not waive the defendants' incompetency under the Dead Man's Statute saying:

> "Appellants [defendants] insist that such examination constituted a waiver by appellee [plaintiff] of objection to the competency of appellants to testify in this cause as to the matters there inquired into. We cannot agree with this contention.
>
> "It is true that by calling an adverse party as a witness under § 2-1718, Burns' 1933, § 308, Baldwin's 1934, an administrator waives the incompetency of the witness and renders him competent for all purposes. [Citations omitted] But when appellants were examined under § 6-911, Burns' 1933, § 3109, Baldwin's 1934, no issues were joined and

> they were not being called as witnesses by the adverse party in the present suit. Nor was that a prior trial of the same action or a prior suit involving the same issues. We do not find that any question of waiver was involved." (110 Ind. App. at 296-297, 38 N. E. 2d at 869)

In the case at bar, both petitioners were in default at the time respondents took the deposition of petitioner Markun, and had lost their standing in court.[1] No issues had been joined, and the petitioners up to that time had never denied indebtedness to the Jack Marks estate. The rule announced by the Appellate Court of Indiana in the *Schroeder* case is clearly applicable to the facts of the case at bar. Thus, under Indiana law, the taking of the discovery deposition under such factual circumstances would not constitute a waiver of respondents' right to object at the trial that petitioner Markun was incompetent to testify as to conversations and transactions with the decedent concerning the transfer of the two $25,000.00 checks to him.

3. Whether or Not Use of the Discovery Provisions of the Federal Rules of Civil Procedure Effects a Waiver of an Applicable State Dead Man's Statute Presents a Question of Federal Law

Federal Rule 43(a) makes applicable the Indiana Dead Man's Statute and rules out the testimony of petitioner Markun as to the transaction with the decedent, Jack Marks, whereby petitioner Markun received the two $25,000.00 checks. Respondents took petitioner Markun's deposition pursuant to Federal Rule 26(a),

[1] Respondents had previously requested the clerk of the district court to enter the default of petitioners pursuant to 55(a) (R. 10, 24). The effect of an entry of default against a party is that the party loses his standing in court, cannot appear in any way, cannot adduce any evidence, and cannot be heard at the final hearing. See 6 Moore's *Federal Practice* (2nd Ed. 1953), par. 55.03 (2).

under which the deposition can be used "for the purpose of discovery or for use as evidence in the action or for both purposes." The question whether or not such use of the discovery provisions of the Federal Rules of Civil Procedure waived the Indiana Dead Man's Statute, made applicable by Rule 43(a), should be considered as a matter of federal law rather than of state law. Consequently, whatever the situation might be if the discovery deposition had been taken pursuant to state court practice in a state court proceeding is not controlling.

In this connection, the Court of Appeals said in its opinion:

> "The Federal Rules themselves indicate that a waiver should not result from the mere taking of a discovery examination. Rule 26(f) provides, in substance, that a party shall not be deemed to make a person his own witness for any purpose by taking his deposition. '* * * The purpose of the first sentence of Rule 26(f) is to make it perfectly clear that by merely *taking* a deposition before trial a party does not impose restrictions upon himself with respect to the deponent at the actual trial.' *Anderson* v. *Benson*, 117 F. Supp. 765, 771." (R. 111)

The Indiana statute governing pre-trial examinations of adverse parties—Burns' Ind. Stats. Ann. (1946 Repl.), section 2-1728—2-1732—contains no provision comparable to the first sentence of Federal Rule 26(f). In the absence of such a provision, the Indiana courts can very properly hold that, under the state practice, the taking of a discovery deposition waives the witness' incompetency under the Dead Man's Statute. But when the discovery deposition is taken under the federal practice, effect must be given to Federal Rule

26(e). Consequently, an Indiana case[2] holding that the taking of a pre-trial deposition of an adverse party under the state practice waives the incompetency of such party is not controlling where a litigant in federal court takes advantage of the Federal Rules of Civil Procedure pertaining to discovery. The Court of Appeals, therefore, correctly considered the question of waiver of petitioner Markun's incompetency to be governed by federal law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[2] *Oleska v. Kotar*, 113 Ind. App. 428, 48 N. E. 2d 88 (1943).

FILED
SEP 12 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 284

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. **The question presented as to the waiver of petitioner Markun's incompetency to testify is fundamental to the further conduct of the case.**

Respondents contend that the waiver of petitioner Markun's incompetency to testify under the Indiana Dead

DARK PAGE BLEED THRU

Man's Statute is not fundamental to the further conduct of the case because "other events *might* transpire at the trial" making him competent, and hence the case does not warrant review by this Court (Resps. Br., pp. 10-11). Those other events are that respondents *may* call Markun as a witness at the trial, thereby making him competent as a witness for all purposes, or that the trial court *may*, in its discretion, require him to testify under Burns' Ind. Stats. Ann. (1946 Repl.), Sec. 2-1718.

Respondents do not assure this Court, or petitioners, that they in fact intend to call Markun as a witness, and his right to testify should not depend on the tactics respondents may choose to adopt at the trial when his incompetency has already been waived. Nor should his right to testify be made subject to the trial court's discretion when he has the unqualified right to speak. Moreover, there is nothing to show that petitioners can establish by independent evidence a *prima facie* defense based on Markun's oral agreement with the decedent Jack Marks, and such proof is a prerequisite to the exercise of the trial court's discretion in permitting Markun to testify as to conversations and transactions with respondents' decedent. See *Hearin* v. *Sutherlin*, 116 Ind. App. 310, 64 N. E. (2d) 43.

The issue presented by the petition is not only fundamental to the further conduct of the case but is likely to be dispositive of petitioners' defense and determinative of the outcome of the litigation.

2. **There is no unique factual situation in this case to preclude giving full effect to the waiver of Markun's incompetency to testify arising out of the taking of his deposition by respondents.**

Respondents' contention that the rule in *Oleska* v. *Kotur*, 113 Ind. App. 428, 48 N. E. (2d) 88, should not apply in this case, because petitioners allegedly were in default when respondents took Markun's deposition, is not supported by any Indiana decision.

The case of *Schroeder* v. *Dickson Trust Co.*, 110 Ind. App. 295, 38 N. E. (2d) 868, cited and discussed in Respondents' Brief in Opposition (pp. 12-13), is not applicable to this case. There the examination of the adverse party was taken *prior* to the commencement of the action under a provision in the Indiana Probate Code, Burns' Ind. Stats. Ann. (1933), Sec. 6-911, which merely provided for a written examination under oath in the probate court of a person suspected of having goods of a deceased.[1] See *Montgomery* v. *Montgomery*, 81 Ind. App. 1, 140 N. E. 917. The deposition taken in this case was not such a preliminary examination but was taken *after* the commencement of the action and in the course of litigation. The *Oleska* case is indistinguishable from the case at bar except that the action here was filed in a federal court and not in a state court.

Furthermore, although irrelevant to any question of waiver, petitioners were not in default when Markun's deposition was taken by respondents. Within the time allowed by the District Court's order extending the time to answer the complaint (R. 13), each petitioner filed a motion to dismiss the complaint as insufficient to state a claim (R. 22-23). Those motions were pending when the deposi-

---

[1] That statute was amended by the 1953 revision of the Indiana Probate Code, Chap. 112, Sec. 1310, Indiana Acts of 1953; Burns' Ind. Stats. Ann. (1953 Repl.), Sec. 7-710, to provide that the probate court in such proceeding may adjudicate the rights of the parties. In view of that amendment, the *Oleska* case would now apply to an examination taken in such proceeding.

tion was taken; no default had been entered by the clerk or the District Court, and respondents' pending motions for a default judgment were subsequently denied (R. 27).

3. **The decision below is plainly erroneous in failing to apply the Indiana law in the Oleska case made applicable by Federal Rule 43(a).**

Federal Rule 43(a) makes applicable the Indiana Dead Man's Statute and the Indiana decisions construing that statute. It is Rule 43(a) which relates to the competency of a witness to testify and not Rule 26(f). The decision of the court below on this question presented by the petition merits review by this Court.

Respectfully submitted,

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MICHAEL L. FANSLER,
Attorneys for Petitioners.

FANSLER, FAUVRE, DONGUS & CHAMBERS,
Of Counsel.

AUG 2 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 336

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased, *Cross-Petitioners,*

v.

LOUIS R. MARKUN, and MAPLE ROAD VILLAGE, INC., *Cross-Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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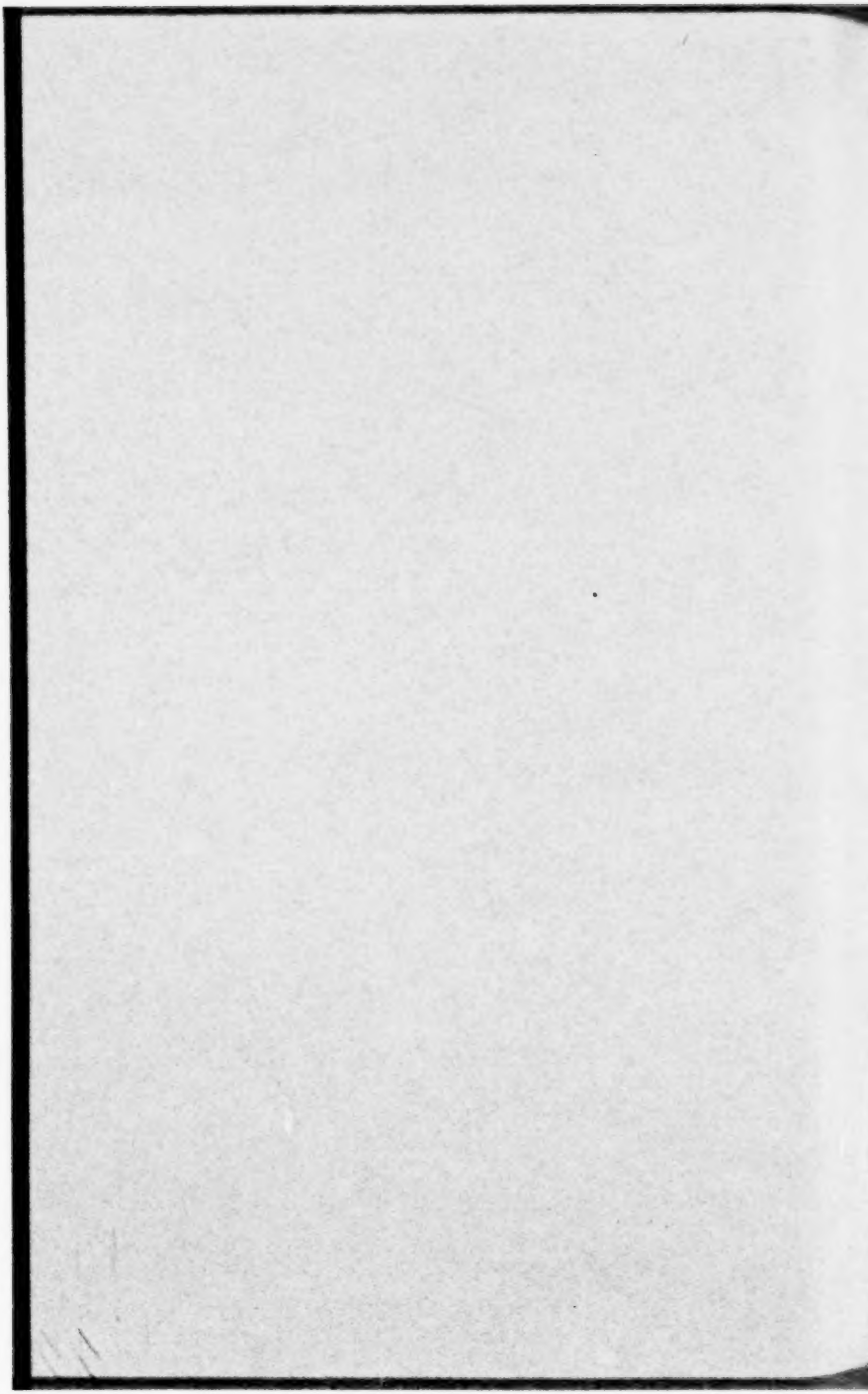

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DARK PAGE BLEED THRU

IN THE

Supreme Court of the United States

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JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased, *Cross-Petitioners,*

v.

LOUIS R. MARKUN, and MAPLE ROAD VILLAGE, INC., *Cross-Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-petitioners, Joseph J. Duling and Charles C. Scott, executors of the last will and testament of Jack Marks, deceased, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit holding that the District Court did not abuse its discretion in failing to enter a default judgment for cross-petitioners, the writ to issue only in the event this Court should grant the petition for a writ of certiorari in No. 284, at this Term.

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OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals is reported at 231 F. 2d 833, and is set out in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit (set out in Appendix B hereto) was entered on April 11, 1956. Cross-respondents petition for rehearing was denied on May 1, 1956. By an order entered on July 20, 1956, Mr. Justice Reed extended the time for cross-petitioners to file this conditional cross-petition for a writ of certiorari to and including August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when defendants have flagrantly and callously disregarded the requirements of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, without any justification or excuse whatsoever for such conduct appearing in the record, the District Court has an absolute discretion to deny a default judgment to the plaintiffs under Federal Rule 55, or whether the exercise of such discretion is reviewable on the record as it stands in the appellate court?

FEDERAL RULES INVOLVED

Rule 1 provides:

> "Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just,

speedy, and inexpensive determination of every action."

The pertinent portion of Rule 6(b) pertaining to time enlargement provides as follows:

> "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; * * *."

The pertinent portions of Rule 55 pertaining to default provide as follows:

> "(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.
>
> "(b) Judgment. Judgment by default may be entered as follows:
>
> * * * *
>
> "(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If a party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative)

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shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

"(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b)."

STATEMENT OF THE CASE

In view of the fact that cross-petitioners, as respondents, have stated the case in some detail in their brief in opposition to the petition for a writ of certiorari in No. 284, only a brief summary of the facts relevant to this cross-petition will be stated here.

This action was brought by cross-petitioners as executors of the last will and testament of Jack Marks, deceased, to recover the balance of $44,404.91, plus accrued interest, due to the testator's estate upon a loan transaction under which the cross-respondent Louis R. Markun received the sum of $50,000.00 from the testator by two $25,000.00 checks issued during the latter's lifetime. Cross-petitioners are citizens of West Virginia and cross-respondents are citizens of Indiana.

The complaint herein was filed by cross-petitioners in the District Court at Indianapolis on March 11, 1954 (R. 2), and, together with the summons, was served

on cross-respondents on March 16, 1954 (R. 9). Cross-respondents filed a notice of appearance in the action on March 30, 1954 (R. 9). Although answers or other responsive pleadings should have been filed by April 5, 1954, cross-respondents did nothing until after June 7, 1954, on which date cross-petitioners requested the clerk of the District Court to enter a default pursuant to Federal Rule 55(a) (R. 10).

On June 16, 1954, nine days after cross-petitioners had requested the clerk to enter a default and over two months after the time for answering had expired, cross-petitioners filed a motion for an enlargement of the time within which they might answer the complaint to June 28, 1954 (R. 12-13). The application made no showing of "excusable neglect", but merely stated that

> "* * * in order for the defendant to properly answer plaintiff's complaint it is necessary to make a complete examination of the defendants' books and records and that such an examination cannot be completed before the said 28th day of June, 1954."

The motion was granted ex parte the following day (R. 13).

Thereafter, as soon as supporting affidavit could be obtained, cross-petitioners on June 25, 1954, moved to vacate the time enlargement order entered on June 17, 1954, and also for a default judgment to be entered by the Court pursuant to Federal Rule 55(b)(2) on the ground that cross-respondents had failed to answer or otherwise defend within the time prescribed by Rule 12(a) (R. 14-15). The affidavit filed in support of cross-petitioners' motion to vacate the time enlargement showed that as early as December, 1952, the cross-

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petitioners had made an effort to get cross-respondent Markun's version of the $50,000.00 transaction involved in this action and mentioned in the complaint. The affidavit also showed that cross-petitioners sent four separate and successive letters to cross-respondent Markun on this subject, said letters being dated December 16, 1952, March 3, 1953, October 27, 1953, and December 21, 1953, respectively, and that no replies to any of these letters had been received (R. 15-20).

On June 28, 1954, the last day for filing answers under the Court's time enlargement order of June 17, 1954, each of the cross-respondents filed a motion to dismiss the complaint on the ground that the allegations thereof were not sufficient to state a claim (R. 22-23). Since the cross-respondents had asked for time to "answer" the complaint and since the Court enlarged the time solely so that "answers" could be filed, cross-petitioners, on July 9, 1954, again requested the clerk of the District Court to enter the default of the cross-respondents pursuant to Federal Rule 55(a) (R. 24), and filed a second motion for a default judgment to be entered by the Court pursuant to Rule 55(b) (2) (R. 25).

The District Court did not grant oral argument on cross-petitioners' motions to vacate the time enlargement order of June 17, 1954, and for default judgment, until January 18, 1955, and on said date it denied cross-petitioners' motions, and granted cross-respondents leave to withdraw their motions to dismiss and to file answers (R. 27). The answer of cross-respondent Markun explained the $50,000.00 set out in the complaint by alleging an oral agreement between Jack Marks and himself (R. 28-29).

On February 2, 1955, the cross-respondents filed motions for summary judgment (R. 32-34) which the District Court granted on May 20, 1955. Final judgment dismissing the action was entered on May 26, 1955 (R. 58).

On appeal to the United States Court of Appeals for the Seventh Circuit, that Court refused to reverse the judgment of the District Court for failing to enter a default judgment (R. 106). However, the Court of Appeals held that the entry of a summary judgment was error (R. 108), and remanded the case for a trial on the merits in the District Court (R. 114).

REASONS FOR GRANTING THE WRIT

In holding that the District Court did not abuse its discretion in failing to enter a default judgment for cross-petitioners, the Court of Appeals conceded that there had occurred "a pattern of flagrant disregard of Federal Rules of Civil Procedure insofar as the dates for filing pleadings are concerned" (R. 103), and that the "apparently callous disregard by [cross-respondents] for the provisions of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, would have justified the entry of a default judgment for [cross-petitioners]" (R. 106). Such conduct was in line with other evasive conduct and concealment practiced by the cross-respondents from the outset, as commented on in the Court of Appeals opinion. The Court of Appeals opinion notes that cross-respondent Markun had ignored four letters of inquiry from cross-petitioners (R. 110), failed to appear for his deposition (R. 104, 109-110), and evinced an "unwillingness to disclose to the executors the nature of the transaction involving the two $25,000.00 checks" (R. 111).

The Court of Appeals concedes that there was nothing whatsoever in the record justifying the conduct of the cross-petitioners. However, it remarked in this connection that:

> "* * * There may have been some reasons known to the Court which do not appear in the record. The defaults may have been due to the frequent change in attorneys representing the defendants, for defendants have had at least four sets of attorneys in this proceeding. * * *" (R. 106).

The suggestion that the change in cross-respondents' attorneys may have influenced the situation is without merit, since the cross-respondents were already in default before there was any change in counsel. The effect of the Court of Appeals' decision, on the record in the present case, is to give the District Court an *absolute* and uncontrolled discretion to deny a default judgment, no matter what the conduct of the defendants may have been. Cross-petitioners concede that the District Court has a rather broad discretion in such matters, but submit that it is a *reviewable* discretion, which must be weighed in the light of the record, and not upon speculation as to possible events not appearing in the record.

Federal Rule 55(c) provides that "[f]or good cause shown the court may set aside an entry of default", but, where a defendant makes no attempt to show any cause at all, the District Court has no discretion to set aside a default.

Likewise, Federal Rule 6(b) provides that:

> "When by these rules * * * an act is required * * * to be done at or within a specified time, the court for cause shown may at any time in its dis-

> cretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; * * *."

But, where a defendant makes no attempt to show any cause or excusable neglect at all, the District Court has no discretion to permit the act to be done.

The present case presents an important question in the application and administration of Federal Rule 55 governing default judgments, and hence merits a review by this Court. There has as yet been no authoritative decision by this Court defining the limits of a District Court's "discretion" in granting or denying a default judgment; and cross-petitioners submit that the effect of what the Court of Appeals did here was to permit the District Court to exercise an *absolute* discretion in such matters, not justified by anything in the record. This is not in accord with the spirit of the Federal Rules of Civil Procedure as stated in the second sentence of Rule 1:

> "* * * They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Inasmuch as the opinion and judgment of the Court of Appeals were favorable to the cross-petitioners in all particulars except in declining to reverse the District Court's ruling in denying their motions for default judgment, cross-petitioners did not believe the adverse ruling of the Court of Appeals on this point would justify, in and of itself, a review of such question by certiorari, despite the importance of a proper construction of Rule 55. But if the Court determines to grant the cross-respondents' petition in No. 284, cross-

petitioners believe it should review the default judgment ruling and correct the plain error of the Court of Appeals. Accordingly, cross petitioners are filing this conditional cross-petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, in the event the Court should grant the petition for a writ of certiorari in No. 284, this cross-petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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JOHN A. ALEXANDER,
DONALD A. SCHABEL,

Attorneys for Cross-Petitioners.

STEPTOE & JOHNSON,
BUSCHMANN, KRIEG, DEVAULT & ALEXANDER,

Of Counsel.

APPENDIX A

[Opinion of Court of Appeals]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11512

October Term, 1955—April Session, 1956

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of JACK MARKS, Deceased,
Plaintiffs-Appellants,

v.

LOUIS R. MARKUN and MAPLE ROAD VILLAGE, INC.,
Defendants-Appellees.

April 11, 1956

Before DUFFY, *Chief Judge*, and LINDLEY and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* Plaintiffs brought this action as the executors of the will of Jack Marks, deceased, alleging defendants were indebted to the Marks Estate in the sum of $44,404.91 and interest. The claim was based upon two checks of $25,000 each, executed by Marks and delivered by him to defendant Markun in August, 1950 and November, 1950, respectively.

The complaint herein was filed on March 11, 1954, and, together with the summons, was served on defendants on March 16, 1954. A notice of appearance by defendants was filed on March 30, 1954. Thereafter occurred a pattern of flagrant disregard of Federal Rules of Civil Procedure insofar as the dates for filing pleadings are concerned.

Although answer or other responsive pleading by defendants should have been filed by April 5, 1954, defendants did nothing until after June 7, 1954, on which date plaintiffs requested the clerk of the District Court to enter a default pursuant to Rule 55(a) Federal Rules of Civil Procedure. Just why the clerk did not enter a default does not appear from the record. Nine days thereafter on June 16, 1954, defendants moved for an extension of time to June 28, 1954 in order to answer the complaint. The application made no showing of "excusable neglect", but the motion was granted ex parte the following day. Thereafter, plaintiffs moved to vacate the order entered on June 17, 1954, but the motion was denied. On June 25, 1954 plaintiffs moved for a default judgment to be entered by the Court pursuant to Rule 55(b)(2) on the ground defendants had failed to answer or otherwise defend within the time prescribed by Rule 12(a), Federal Rules of Civil Procedure. This motion was denied.

On June 11, 1954 notice was served on the attorney who had appeared for defendants, that the deposition of defendant Markun would be taken on June 23, 1954. A subpoena was served on Markun to appear at a designated time and place. The day before the deposition was to be taken the attorney for defendant requested, by telephone, that the deposition be postponed, representing that defendant Markun was suffering from a bad case of poison ivy. The request for a postponement was refused because the principal counsel for plaintiffs was, at that time, enroute from Clarksburg, West Virginia to Indianapolis. Neither defendant nor his attorney appeared pursuant to the notice and subpoena, and when inquiry was made at the office of defendant's attorney, the latter's secretary read what purported to be a doctor's certificate to the effect that defendant Markun was confined to bed because of heat exhaustion. On June 25, 1954, because of defendant's failure to appear for examination, plaintiffs moved

for default pursuant to Rule 37(d), Federal Rules of Civil Procedure. This motion was denied.

On June 28, 1954, the last day for filing answers under the Court's order of June 16, 1954, each defendant filed a motion to dismiss the complaint on the ground the allegations thereof were not sufficient to state a claim. On January 18, 1955 defendants were granted leave to withdraw their motions to dismiss and on that date, nine and one-half months after the answers were originally due, each defendant filed an answer. On February 2, 1955 each defendant filed a motion for summary judgment which motions were granted on May 20, 1955.

Jack Marks was a resident of Clarksburg, West Virginia. Defendant Louis Markun was his nephew and resided in Indianapolis, Indiana. On August 28, 1950 Marks executed a check for $25,000, and on November 13, 1950, another check for $25,000, each payable to the order of defendant Louis Markun, each was drawn on funds personally owned by Marks, and each check was delivered to Markun. The checks were promptly deposited by Markun in an Indianapolis bank, and were paid in due course. Markun personally endorsed the checks, and beneath his signature on each check appeared "For deposit only. Maple Road Village, Inc." The defendant Markun is the president and a director of Maple Road Village, Inc., and he, his wife and son own all of the stock of the corporation.

Jack Marks died on July 27, 1952. However, before his death there had been repaid to him by defendant Markun the sum of $10,500, consisting of two payments of $250 each, received respectively on September 29, 1950 and November 1, 1950, and twenty monthly payments of $500 each, beginning in December, 1950, and ending July, 1952. All of such payments were made by checks drawn on the account of the defendant Maple Road Village, Inc., twenty of the checks being signed by defendant Markun, and two by Markun's wife. Twenty of the checks contained on

their face the notation that they were in payment of "interest."

In opposition to the motion for summary judgment, plaintiffs filed the affidavit of Marguerite Wyckoff who was the bookkeeper for Jack Marks. She disclosed that at Marks' direction she recorded in his journal or ledger the twenty-two checks received from defendant Markun as payments of interest, and that she furnished such monthly payment figures to the accountant who prepared Jack Marks' income tax returns. Miss Wyckoff also swore that in 1952, when Jack Marks was very ill and about one month before his death, defendant Markun telephoned asking that she advise Jack Marks that if he (Marks) should have need for the money, he (Markun) would arrange to repay to Marks the $50,000, or any part thereof that Marks might require. Proof was also made that in Marks' income tax returns the monthly payments from Markun were listed as "income from interest."

On this appeal plaintiffs urge as error 1) the District Court's denials of the several motions by defendants for default judgment were an abuse of discretion, and 2) the Court was in error in granting defendants' motions for summary judgment, as there were genuine issues of material facts which must be resolved.

The apparently callous disregard by defendants for the provisions of the Federal Rules of Civil Procedure pertaining to time limitations within which pleadings must be filed, would have justified the entry of a default judgment for plaintiffs. However, the Court elected to disregard the defaults. There may have been some reasons known to the Court which do not appear in the record. The defaults may have been due to the frequent change in attorneys representing the defendants, for defendants have had at least four sets of attorneys in this proceeding. It should be mentioned, however, the attorneys for defend-

ants on this appeal were not, in any way, involved in the defaults.

Whether a default should be entered or a default judgment be set aside, is a matter resting in the sound discretion of the trial judge. *Jones* v. *Jones*, 7 Cir., 217 F. 2d 239; *Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir., 189 F. 2d 242. Under the circumstances of this case, we cannot say that the District Court abused its discretion in failing to enter a default judgment.

If the pleadings, depositions and affidavits on file show there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law, then the trial court was correct in entering a summary judgment for defendants. Plaintiffs insist that there were and are genuine issues as to material facts, and in any event defendants were not entitled to judgment as a matter of law.

The primary issue in this case is as to the nature of the transaction whereby Marks handed over to defendant Markun the two $25,000 checks. In arguing it was a loan, plaintiffs point out that Marks, in making entries in his books, treated the monthly payments as interest, and also that Marks paid income tax on such payments on the basis that they were payments of interest. Plaintiffs also emphasize the willingness of Markun, when Marks was ill, to pay back the entire $50,000 if Marks desired that he should do so. They also point to the fact that Markun and his wife, on February 27, 1951, executed a mortgage to Marks in the sum of $50,000. Although the recital in the mortgage that the loan was evidenced by two $25,000 notes is erroneous, the dates of the alleged notes conform almost exactly to the dates when defendant Markun received the two $25,000 checks from Jack Marks. This mortgage was released by Marks on February 18, 1952, but this release did not purport to discharge the debt, if one existed. It might be here noted that defendant Mar-

kun's explanation of the debt recitals in the mortgage is that he was in financial difficulties on February 27, 1951, and in order to protect certain realty (we assume from his creditors), he and his wife executed and recorded the mortgage purporting to secure two $25,000 notes. Markun insists, however, there never were any notes and, in fact, that he was not indebted to Marks.

Defendant Markun claims that there was a close relationship between him and his uncle Jack Marks. Markun says he received the $50,000 from his uncle under an oral agreement that he would send his uncle, then seventy-nine years old, the sum of $500 a month if he, Markun, were financially able to do so, but the total of such payments was not to exceed $50,000; that the total amount actually repaid would be subtracted from the $50,000, and such amount would be treated in Marks' will as an advance against Markun's share of Marks' estate. Markun claims the agreement further provided that if either Marks or he died, there would be no further obligation on the part of him (Markun) or his estate with reference to the $50,000. Markun insists that the transaction was, in fact, a gift of $50,000 to him. Markun claims that one of the motives for the gift was that Marks had sold his poster advertising business in West Virginia for a sum in excess of $50,000, and he did not desire that sum of money to remain in West Virginia.

At the time when Markun filed his answer, he knew of the provisions of the Marks' will. In that pleading he made no reference to the will. However, in his motion for summary judgment, Markun relied on paragraph Sixth, which reads as follows:

> "Sixth: After the payment of the specific bequests hereinbefore named, and the payment of the Federal Inheritance Tax, State Transfer Tax and all other taxes and costs of administration, I give and bequeath unto my nephew, Lewis R. Markun, one-third (⅓) of said residue, from which my Executors shall deduct

> the sum of Fifty Thousand Dollars ($50,000.00), evidenced by two checks in the amount of Twenty-five Thousand Dollars ($25,000.00) each, due my estate from my nephew, Lewis R. Markun, together with any additional advancements made to him and evidenced by checks, which said sums so advanced are to be considered as a part of my estate."

Plaintiffs likewise rely on said paragraph Sixth of the will and point to the words used by Marks in that paragraph " * * * evidenced by two checks in the amount of Twenty-five Thousand Dollars ($25,000.00) each, *due my estate from my nephew, Lewis R. Markun* * * *."

Whether the $50,000 transaction was a loan or a gift may be a mixed question of law and fact. However, the intention of the parties, and the interpretation of the alleged agreement given to it by the parties, are questions of fact which, on this record, are sharply in dispute. These issues should be determined in a trial on the merits where full opportunity for cross-examination is afforded.

Defendant Markun urges that conceding arguendo the $50,000 transaction originally was a debt, the provisions of paragraph Sixth of the Marks' will changed it to an advancement. We do not know the basis of the trial court's decision as no written opinion was filed, nor was an oral opinion given. Hence, we are not informed whether the trial court gave any consideration to this contention. However, in our opinion, paragraph Sixth of the Marks' will, by itself, is not sufficient to show a change from a creditor-testator relationship to an advancement.

In this connection, we have before us defendants' motion to strike from our files an authenticated copy of a decree of the Circuit Court of Harrison County, West Virginia, construing the Sixth paragraph of the will of Jack Marks, deceased. The motion points out that this decree was not filed until after the entry of the judgment on March 26, 1955.

The will construction suit was instituted by the executors in the West Virginia court on March 30, 1954, and the motion for a construction of paragraph Sixth was made in May, 1954, shortly after the executors were advised that Markun was relying on paragraph Sixth of the will to sustain his contention. The executors had not been previously advised because, in his answer to this suit, Markun had not relied on any provision in Jack Marks' will. Because of congestion in the West Virginia court calendar, a hearing was not held until June 16, 1955. The decree was issued August 6, 1955. The transcript of the record on appeal to this Court had already been filed. We think it was proper to advise this Court of the decree and the motion to strike will be denied.

Service upon Markun in the West Virginia suit was obtained by publication pursuant to West Virginia statutes. There is no claim made here that the Court did not have jurisdiction to construe the will of Jack Marks. That Court decided the $50,000 transaction with Markun created a debt, and that the words "advancements" and "sums so advanced" were not employed in a technical sense as in the law of intestacy, but in the popular sense with a meaning equivalent to "loans."

Defendant Markun argues that he is not bound by the decree as he was not personally served. He also insists that the District Court, in applying State law, is not required to recognize unreported opinions of State nisi prius courts, citing *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153.

We agree that the West Virginia decree does not personally bind Louis R. Markun, but the opinion of that Court is entitled to great respect. A West Virginia will is involved, and a West Virginia court applied West Virginia law. Furthermore, the opinion in King stated (333 U. S. 162) " * * * Nor is our decision to be taken as promul-

gating a general rule that federal courts need never abide by determinations of state law by state trial courts. * * *."

Inasmuch as there will be a trial on the merits we need consider only one further question. Defendant Markun's version of the $50,000 transaction is practically uncorroborated. Clearly he would be incompetent to testify as to the $50,000 transaction with Marks under the Indiana Dead Man's Statute. 2 Burns Ind. Stats. (1946) repl.) § 2-1715.

Defendant Markun insists that this objection to his competency to testify has been waived because plaintiffs took his deposition pursuant to the discovery provisions of the Federal Rules of Civil Procedure.

The first attempt to take Markun's deposition failed because of the claim that Markun was suffering from poison ivy or perhaps heat exhaustion. When the deposition was finally taken on June 29, 1954, plaintiffs had on file three motions for default. The complaint was cast in the form of three alternative causes of action. It seemed proper for plaintiffs to ascertain what participation defendant Maple Road Village, Inc. had in the $50,000 transaction. Four letters of inquiry from the executors to Markun had been ignored. The twenty-two "interest" checks, although signed by Markun or his wife, were drawn on the account of the Maple Road Village, Inc. The discovery deposition thus taken was not offered in evidence by the plaintiffs. There was no waiver of the Dead Man's Statute unless the taking of the deposition was, in itself, a waiver.

Ignoring for the moment the question of waiver, Rule 43(a) Federal Rules of Civil Procedure[1] rules out the tes-

[1] "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general

timony of Markun as to the transaction with the deceased Marks, whereby he received two checks for $25,000 each. Paraphrased, the Rule would read: "The competency of a witness to testify shall be determined under the statutes of the United States or under the rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity,[2] or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

The Federal statute "Competency of Witness Act"[3] was repealed by the 1948 Revision of the Code. It is, therefore, clear that the Indiana Dead Man's statute would be applicable, and by reason thereof Markun would be incompetent to testify.[4]

However, we are confronted with the question of waiver.

It is true that the taking of a deposition under Indiana law of a party who is otherwise incompetent would be a waiver. *Oleska, Administrator* v. *Kotur*, 113 Ind. App. 428, 48 N. E. 2d 88. But the deposition in the case at bar was

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jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *. The competency of a witness to testify shall be determined in like manner."

[2] "But where are these rules to be found? How vain will be the search for them has been shown, ante § 6. This part of Rule 43 seems to have little prospect of service." 1 Wigmore on Evidence, 3rd Ed. 201.

[3] "Competency of witness governed by state laws. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which he court is held." 28 U. S. C. § 631.

[4] "However, if state law excludes the evidence and no federal statute or rule admits it, then the evidence must be rejected. 5 Moore's Federal Practice (2d Ed.), p. 1320, § 43.04." *Atlantic Coast Line R. Co.* v. *Dixon* (5th Cir.), 207 F. 2d 899, 903.

taken pursuant to the Federal Rules of Civil Procedure as a matter of discovery. The actions of the defendant Markun made such an examination almost imperative. In addition, plaintiffs, at that time, assumed that they would be granted a judgment by default. Before a judgment could be entered it was necessary to determine which of the three alternative causes of action could be sustained.

The question comes down to this. Under Federal Rules of Civil Procedure, plaintiffs were entitled to conduct a discovery examination and take the deposition of defendant Markun. A proceeding by discovery was particularly appropriate in view of Markun's unwillingness to disclose to the executors the nature of the transaction involving the two $25,000 checks. Plaintiffs did not offer the deposition in evidence. There was no intentional relinquishment on their part of their right to raise the objection as to the competency of Markun to testify. We do not think that a litigant in Federal Court must either refrain from taking advantage of the Federal Rules pertaining to discovery or to proceed to do so at his peril because, under state law, in a state court proceeding, the taking of a deposition is considered a waiver.

The Federal Rules themselves indicate that a waiver should not result from the mere taking of a discovery examination. Rule 26(f) provides, in substance, that a party shall not be deemed to make a person his own witness for any purpose by taking his deposition. " * * * The purpose of the first sentence of Rule 26(f) is to make it perfectly clear that by merely *taking* a deposition before trial a party does not impose restrictions upon himself with respect to the deponent at the actual trial." *Anderson* v. *Benson*, 117 F. Supp. 765, 771.

We hold plaintiffs did not waive their right to object at the trial that defendant Markun was incompetent to testify as to conversations and transactions with Jack Marks, now

deceased, concerning the transfer of the two $25,000 checks to him.

REVERSED AND REMANDED.

APPENDIX B

[Judgment]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, April 11, 1956

Before Hon. F. Ryan Duffy, *Chief Judge*, Hon. Walter C. Lindley, *Circuit Judge*, Hon. H. Nathan Swaim, *Circuit Judge*

Joseph J. Duling and Charles C. Scott, Executors of the Last Will and Testament of Jack Marks, *Plaintiffs-Appellants*,

v.

Louis R. Markun and Maple Road Village, Inc., *Defendants-Appellees*.

This cause came on to be heard on the transcript of the record from the United States Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court

SEP 13 1956

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 336

JOSEPH J. DULING and CHARLES C. SCOTT, Executors of the Last Will and Testament of Jack Marks, Deceased,

Cross-Petitioners,

v.

LOUIS R. MARKUN, and MAPLE ROAD VILLAGE, INC.,

Cross-Respondents.

CROSS-RESPONDENTS' BRIEF OPPOSING CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Opinion Below

The District Court did not render an opinion. The opinion of the Court of Appeals for the Seventh Circuit is reported at 231 F. (2d) 833.

Jurisdiction

The jurisdictional requisites are adequately set forth in the conditional cross-petition.

Question Presented

Whether the District Court abused its discretion under Federal Rule 6(b) in granting cross-respondents' motion for an enlargement of time within which to answer the complaint.

Federal Rules Involved

In addition to Rule 1 and those portions of Rule 6(b) and Rule 55 of the Federal Rules of Civil Procedure set out in the conditional cross-petition at pages 2-4, the following portions of Rule 12 pertaining to defenses are involved:

> "(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, * * *.
>
> "(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * *. A motion making any of these defenses shall be made before a pleading if a further pleading is permitted. * * *"

Statement of the Case

The facts are adequately stated in the conditional cross-petition.

Reasons for Denying the Writ

There was no flagrant or callous disregard by cross-respondents of the Federal Rules of Civil Procedure pertaining to the time within which pleadings must be filed, and the question presented as stated in the conditional cross-petition does not arise on the record.

Admittedly cross-respondents did not file an answer within 20 days after service of the summons and complaint as required by Rule 12(a). However, when cross-petitioners filed their request with the clerk for a default (R. 10), cross-respondents nine days thereafter moved the District Court for an enlargement of time within which to answer the complaint (R. 12-13), and the motion was granted the next day (R. 13). Cross-petitioners then moved to vacate the time-extension order and for a default judgment under Rule 55(b)(2) (R. 14-15), although cross-respondents were not then in default.

Within the time allowed by the time-extension order, cross-respondents filed motions to dismiss the complaint under Rule (12)(b) for failure to state a valid claim for relief (R. 22-23). Cross-petitioners then filed a second motion for default judgment on the ground that the motions to dismiss the complaint were not "answers" (R. 25). This second motion of cross-petitioners for a default judgment was patently frivolous and without merit, since under Rule 12(b) a motion to dismiss the complaint for failure to state a claim must precede an answer in bar, and the "answer" to the complaint required by Rule 12(a) includes a motion raising a defense under Rule 12(b).

The record does not show an abuse of the District Court's discretion in granting cross-respondents an extension of time within which to plead. The conditional

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cross-petition presents no important or substantial question under the Federal Rules of Civil Procedure and should be denied even though this Court should grant cross-respondents' petition for a writ of certiorari in No. 284.

Respectfully submitted,

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